DATE: September 28, 1993
CASE NO. 85-ERA-34

IN THE MATTER OF

THOMAS G. BASSETT,

COMPLAINANT,

v.

NIAGARA MOHAWK POWER CORPORATION,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

This proceeding arises under the employee protection or whistleblower provision at Section 210 of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988), and is before me for review pursuant to 29 C.F.R. § 24.6(b) (1992).

Complainant, a quality assurance engineer for Respondent, contends that he was improperly and discriminatorily evaluated in his work performance in retaliation for his engaging in conduct which is protected under the ERA. A hearing was held and the Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R.D. and O.) on October 17, 1985. The ALJ concluded that the complaint should be dismissed because Complainant had failed to show an adverse employment action and, as a result, had failed to establish a prima facie case under the ERA. The parties have filed post-hearing pleadings which I accept as briefs in opposition to and in support of the R.D. and O. [1]

For the reasons below, I reject the ALJ's conclusion that no adverse employment action has been established. I agree, however, that this complaint must be denied because, although Complainant engaged in protected conduct, he failed to meet his burden to establish that the adverse action was

retaliatory discrimination. [2]

Complainant contends that certain narrative comments contained in his 1985 performance evaluation were made by his manager, David Palmer, in retaliation for Complainant's efforts

to promote safety goals prescribed by the Nuclear Regulatory Commission (NRC) and as punishment for his earlier diligence in the performance of protected quality assurance functions. Respondent contends that Complainant's performance evaluation/rating and the commensurate salary increase which resulted from it simply do not add up to the type of harm or injury which must be present to support a finding of discriminatory treatment under the ERA.

The challenged comments pertain to Complainant's performance of his assignment to draft Respondent's quality assurance procedures, as required by the NRC under 10 C.F.R. Part 50, Appendix B (1992). This task required Complainant to coordinate and resolve comments received from various sources regarding the procedures.

The ALJ described the performance evaluation as follows:

> Though generally favorable, the performance rating contained a comment ascribed to Palmer that indicated that his [Complainant's] meeting expectations in regard to the goal associated with procedures was "borderline," adding that his performance will have to improve or an unsatisfactory rating may result.

Findings of Fact No. 9, R.D. and O. at 3.

> . . . [H]is rating was said to be considered borderline between "met expectations" and "did not meet expectations."

R.D. and O. at 5.

The ALJ found that Palmer's comment did not constitute an adverse employment action. The ALJ found no proof of disparate treatment or disparate impact, no adverse economic effect, and no change in working conditions. The ALJ explained that Palmer's comment:

> . . . was not a direction to cease protected activity under a threat of discharge or disciplinary action, but was a bluntly worded caution that better performance in that area was expected. . . .

R.D. and O. at 6 (citation omitted). Finally, the ALJ emphasized that despite Complainant's fears that the "negative comment" might affect his future opportunities, there is no evidence that Complainant has been harmed or prejudiced to date by the comment.

Id.

I find that the ALJ has too narrowly defined the adverse action element of a prima facie case of retaliation. The ALJ improperly concentrates on the lack of any adverse economic impact resulting from the "negative comment," and appears to improperly consider Respondent's motive, which is irrelevant at this stage of the analysis. *See DeFord v. Secretary of Labor*, 700 F.2d 281, 286-87 (6th Cir. 1983); *Assistant Secretary and Guernsey v. J.E. Nelson Transportation*, Case No. 91-STA-24, Sec. Dec. and Ord. of Rem., Feb. 13, 1992, slip op at 12. Further, a complainant need not "prove that he was

treated differently from other similarly situated" employees to establish a prima facie case. *DeFord*, 700 F.2d at 286; *Helmstetter v. Pacific Gas & Electric Co.*, Case No. 91-TSC-1, Sec. Dec. and Ord. of Rem., Jan. 13, 1993, slip op. at 9. In this case, the negative comments and warning contained in Complainant's 1985 performance evaluation are an adverse work evaluation, affecting the terms of Complainant's employment and they constitute an adverse employment action. *See* 42 U.S.C. § 5851(a); *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987); *see also McCuistion v. TVA*, Case No. 89-ERA-6, Sec. Dec. and Ord., Nov. 13, 1991, slip op. at 8; *Ryan v. Niagara Mohawk Power Co.*, Case No. 85-ERA-24, Sec. Fin. Dec. and Ord., Mar. 7, 1986, slip op. at 2; *cf. Stoller v. Marsh*, 682 F.2d 971, 976-78 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1037 (1983). [3]

The ALJ found that Complainant engaged in protected conduct and I agree. In earlier years, Complainant's duties required him to make internal audit reports to management with regard to safety related concerns. *See* Findings of Fact Nos. 11-12, R.D. and O. at 4-5; Transcript (T.) at 33, 39-40, 171-72. It is protected conduct for an employee to file internal quality control reports and to make internal complaints regarding safety or quality problems. *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984); *Shusterman*, slip op. at 8; *see also Passaic Valley Sewerage Comm'rs v. United States Dep't of Labor*, 992 F.2d 474, 478-80 (3d Cir. 1993). Complainant also engaged in protected activity in October 1984, when he provided both oral and written testimony on his concerns to the NRC. *See* 42 U.S.C. § 5851(a)(2),(3); Findings of Fact No. 13, R.D. and O. at 4, 5. These protected activities, however, do not raise an inference of retaliation. As the ALJ found, the supervisors involved in Complainant's 1985 performance evaluation had no knowledge of Complainant's statements to the NRC. Findings of Fact No. 14, R.D. and O. at 4. The temporal remoteness of Complainant's auditing work to the adverse evaluation also refutes a causal connection. *Shusterman*, slip op. at 8-9. Complainant's principal auditing work occurred in

---

1982 and 1983, long before this complaint was filed, and Complainant engaged in no nuclear auditing work in the year which preceded the evaluation. *See* T. at 169-72. Furthermore, Complainant does not strenuously press auditing work as a motivating factor for the adverse evaluation. He testified in response to the ALJ's direct inquiry that it is "very hard for me to identify any one specific case which can be called a cause of specific reprisal." T. at 39. For purposes of this case, however, I will assume that Complainant's recent assignment to coordinate and resolve various comments in order to draft quality assurance procedures implicitly requires Complainant to raise quality problems or make quality control reports, which is sufficient to constitute protected conduct and which raises an inference of retaliation. *See Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (temporal proximity between adverse action and protected activity justifies inference of retaliatory

motive).

Regardless, Respondent has presented nondiscriminatory reasons for the adverse evaluation sufficient to rebut the presumption, and Complainant has not shown that the reasons are pretextual. The adverse comment resulted not from Complainant's performing his job thoroughly and diligently but because Complainant's supervisors were dissatisfied with his lack of initiative and felt his performance could be improved. T. at 169, 173-78. The testimony of a supervisor, William Connolly, establishes that Complainant was not fully meeting the goals which his supervisors had set out for him in his new assignment. Instead of consolidating comments from the various sources with whom he was to be the contact person, Complainant seemed to be just passing them along, thus hindering the development of unified comments. Connolly testified that it was his perception that Complainant was not aggressively pursing his new assignment, including the primary function of comment coordination. T. at 176, 177.

Also significant is Complainant's 1984 performance evaluation in which Complainant indicated "retirement" as his career goal. *See* T. at 76, 77; Complainant's Exhibit 2. Given this indicia of Complainant's attitude, it is not surprising that management viewed him as lacking initiative and as possibly requiring written incentive for improvement.

I have considered Complainant's arguments that Respondent's motive was improper, but the arguments are unpersuasive. That Complainant and his supervisors submitted written rebuttal and surrebuttal regarding the performance evaluation and held an "unusual" conference shows only that he and they strongly disagreed and, quite typically, became combative over the evaluation. Although Complainant alleges that the criticism in the evaluation had not been raised previously "during the course

---

of the past year," this allegation is not convincing here where the criticism came less than five months after the new assignment and was tantamount to a "bluntly worded caution that better performance in that area was expected." *See* Complainant's Rebuttal at 2; R.D. and O. at 6. Complainant has not shown that his performance on the new assignment was other than described by Respondent. [4]

Accordingly, the complaint IS DENIED.

SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

OAA:WLAUDERDALE:tm:February 19, 1996
Room S-4309:FPB:219-4728

[ENDNOTES]

[1] In addition, Complainant has filed follow-up statements in which he asks for reconsideration based on "new" evidence. Respondent has filed a memorandum in opposition. As explained *infra* at page 5 n.3, I deny Complainant's request.

[2] Under the whistleblower provision of the ERA, an employee alleging unlawful retaliation can establish a prima facie case by showing (1) that the employee engaged in conduct protected by the ERA; (2) that the employer was aware of that conduct and took some adverse action against the employee; and (3) that the inference is raised that the protected activity was the likely reason for the adverse action. *Shusterman v. Ebasco Services, Inc.*, Case No. 87-ERA-27, Sec. Fin. Dec. and Ord., Jan. 6, 1992, slip op. at 5-6, *aff'd mem.*, *Shusterman v. Secretary of Labor*, No. 92-4029 (2d Cir., Sept. 24, 1992). The employer may rebut this showing by establishing that the adverse action was motivated by legitimate, nondiscriminatory reasons. The employer, however, bears only a burden of production of the rebuttal evidence; the ultimate burden of persuasion regarding the existence of retaliatory discrimination rests with the employee. Once the employer satisfies its burden of production, the employee then must establish that the proffered reason is pretextual. *See St. Mary's Honor Center v. Hicks*, No.92-602, 1993 U.S. LEXIS 4401, at 15-16 (U.S. June 25, 1993).

[3] The "new" evidence proffered by Complainant consists of testimony concerning a subsequent event, which was elicited during the course of an administrative hearing on a second ERA complaint filed by Complainant, *Bassett v. Niagara Mohawk Power Co.*, Case No. 86-ERA-2. The evidence is offered to dispute the ALJ's finding of no adverse employment action, specifically his ruling that the possibility of injury from the adverse performance evaluation is purely speculative. Since I conclude that the record before the ALJ supports a finding of adverse action, the additional evidence proffered by Complainant is immaterial and his request that the record be reopened for its admission is moot. *Cf.* 29 C.F.R. §§ 24.6(b), 18.54(c) (1992). I also note that the additional evidence is not "newly discovered," *i.e.*, in existence, but discovered after the hearing. *Boyd v. Belcher Oil Co.*, Case No. 87-STA-9, Sec. Dec. and Ord., Dec. 2, 1987, slip op. at 3, and cases cited therein.

[4] Although Complainant refers to "harassment" since 1981, I agree with the ALJ that the only action specifically and timely raised here is the 1985 performance evaluation, R.D. and O. at 4, which I find nondiscriminatory. "Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." *Delaware State College v. Ricks*, 449 U.S. 250, 257 (1980).